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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. THOMAS JEROME MARTIN, Defendant and Appellant.	C069231 (Super. Ct. No. 08F05201)

A jury convicted defendant Thomas Jerome Martin of second degree murder, aggravated assault on a child under the age of eight years resulting in death, and the sale of marijuana. The trial court sentenced him to a combined indeterminate and determinate prison term of 29 years to life.

Defendant now contends (1) the trial court should have instructed sua sponte that the jury needed to determine whether a prosecution witness was an accomplice; (2) the trial court erred in allowing readback of witness testimony during jury deliberations

without defendant or his attorney present; (3) reversal is warranted due to cumulative prejudicial error; and (4) the indeterminate prison term of 25 years to life is cruel and unusual punishment.

We conclude defendant's contentions lack merit. Nonetheless, our review discloses that, on the aggravated assault conviction, the abstract of judgment incorrectly indicates defendant was convicted of violating Penal Code section 273a, subdivision (b), rather than Penal Code section 273ab.[1] We will affirm the judgment and direct the trial court to correct the abstract of judgment.

BACKGROUND

Defendant brought the limp body of three-year-old Valeeya B. to the emergency room, accompanied by the child's mother, Mia H. Defendant was screaming for help because the child was not breathing. He repeatedly stated, "It's all my fault" and "I thought she would come get me." Defendant was very agitated and appeared to be on a stimulant.

Defendant gave inconsistent versions of what occurred. He said Valeeya had been sick for a week, and when he walked by her bedroom that night he heard her vomiting. He went to the bathroom before checking on her, but when he returned she was not breathing. However, defendant also said he was awakened by Valeeya vomiting, but assumed she would come get him and then fell back asleep. When he awakened again, he went into Valeeya's room and discovered that she was not breathing.

Efforts to resuscitate Valeeya were unsuccessful, and she was pronounced dead. An autopsy disclosed she had bruises on both cheeks, and on her neck, scalp, arms, chest and back. Both of her lungs were bruised, there was blood in her chest cavity, her small bowel was bruised and completely torn, and her pancreas was severely inflamed and

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[1] Undesignated statutory references are to the Penal Code.

densely scarred. Some of the bruises and abdominal injuries appeared to be older and healing, while others appeared to have been inflicted recently. Valeeya had nine old and new rib fractures, her adrenal gland was shrunken and scarred from previous hemorrhaging, her liver was scarred from previous injury, and her tongue was deeply bruised.

Valeeya's extensive internal injuries were caused by blunt force impact to the abdomen and would have been very painful. Valeeya's brain was so bruised it could have caused unconsciousness, concussion or seizures, and her head injury was of the "classic" type caused by being slammed against a hard surface. The pathologist concluded that the cause of death was blunt force thoraco-abdominal injuries due to battered child syndrome repeatedly inflicted over a period of time.

When sheriff's detectives and a deputy coroner went to the apartment defendant shared with Mia H., they smelled marijuana and found a smoking pipe, square plastic baggies and a digital scale.

Mia H. had previously been referred to Child Protective Services (CPS) after she tried to run over her boyfriend while one of her children was in the backseat of the car without a seatbelt. Her children were placed in foster care for a while.

Mia H. subsequently informed the CPS worker she was pregnant from a one-night stand and did not intend to have a relationship with the father. But the father was defendant, and he had moved in with Mia H. three months earlier. He made sure he was not present when CPS visited.

During one of the CPS visits, Valeeya's arm was in a sling. Mia H. explained to the CPS worker that the child fell out of bed. The next month Valeeya had a burn on her arm; Mia H. said it was an accident involving a curling iron. The CPS matter was closed after Mia H. participated in drug rehabilitation and parenting classes.

Valeeya's preschool teacher, David Porter, testified that Valeeya had poor attendance and vomited more than any other child. He said Valeeya acted happy and relaxed around her mother but was very quiet around defendant.

Vicci Williams, a friend of defendant's who lived in the neighboring apartment building, had a son in the same preschool as Valeeya. On one occasion, Valeeya lost her shoe while walking to school and defendant reacted harshly. Williams told defendant to "chill out," that it was "just a shoe." Williams was so concerned that she told Mia H. about the incident.

Alysia Torres lived in the apartment next to defendant and Mia H., and the two apartments had a "thin" common wall. About a week before Valeeya's death Torres heard defendant yelling and heard loud banging and splashing. Valeeya was crying in the bathroom and defendant kept yelling, "Stop fucking crying." Torres heard similar yelling and crying on previous occasions while defendant was with the children. The noise would usually cease when Mia H. arrived home.

Defendant told his friend, Jahmal Stanford, that unlike Mia H. he believed in physical discipline of the children. He would "whoop that ass" and he was very harsh with Valeeya. Defendant was often home alone with Valeeya, who acted scared around him, which was very different than the way she acted around Mia H. On one occasion when defendant and Stanford were smoking marijuana on the patio, Valeeya disobeyed defendant's instruction to close the patio door. Defendant went in after her and "whoop[ed] her ass" while she screamed and cried. Stanford described defendant as "flip[ping] on the mad switch" when he went after Valeeya. On another occasion he saw defendant strike Valeeya hard in the stomach as she walked in front of him while he was playing a video game.

Mia H.'s son DeShawn, who was nine years old at the time of trial, testified that defendant would choke Valeeya and throw her by the neck. Defendant told DeShawn not

to tell anyone about the beatings. DeShawn told his mother, but she did not make defendant stop.

Mia H. testified that she met defendant when she was 39 and he was 19. He moved in with her after his grandmother kicked him out of her home. Neither of them had a job; she received Social Security, he received general assistance and they both sold marijuana to supplement their income. She trusted defendant with her children because he seemed friendly to them. Mia H. left the children in his care when she went out shopping, to CPS classes and to doctor appointments.

Mia H. claimed she never saw defendant hit or yell at Valeeya, but admitted Williams told her about the time defendant yelled at Valeeya for losing a shoe at school. She also admitted that she knew Valeeya was afraid of defendant and that Valeeya would act strangely when defendant was around, such as standing at attention and staring at him. DeShawn told her that Valeeya was scared and Mia H. saw defendant look at Valeeya in a "mean" way.

Mia H. claimed she did not know how Valeeya suffered all her injuries, even though she was suspicious of defendant's explanation about the broken arm. Mia H. said she previously took Valeeya to the doctor and no medical problems were noted at that time. On the day before Valeeya died, she woke up sick and vomited a couple of times. Valeeya complained of stomach pain and told her mother that another child hit her at the pool. Mia H. did not notice any bruises when she bathed Valeeya. Valeeya went to sleep that evening and was fine. Defendant was playing a video game, and he and Mia H. smoked some marijuana. The last time she saw defendant before going to bed was around 9:45 p.m. and he was near the couch with some blankets. A few minutes before 11:00 p.m. he woke Mia H. and told her something was wrong with Valeeya. They rushed her to the hospital.

Mia H. broke up with defendant for a short period of time, but then reunited with him until his arrest. Mia H. later pleaded no contest to causing and permitting a child in

her care and custody to suffer unjustifiable pain and suffering (Pen. Code, § 273a, subd. (a)). Mia H. was sentenced to six years in state prison for that offense and did not receive a shorter sentence in consideration for her testimony.[2] Her two remaining children were taken from her, and both were adopted.

Defendant testified in his own defense. He maintained that Williams exaggerated the incident about Valeeya's lost shoe. Contrary to Stanford's testimony, defendant denied striking Valeeya in the stomach while playing a video game, or beating her for failing to close the patio door. He denied ever disciplining Valeeya or even getting angry or yelling at her. He said Valeeya was always happy to see him and was not afraid of him. Defendant denied assaulting or causing any of the injuries inflicted upon Valeeya, and claimed he said it was his fault at the hospital because he felt responsible for not checking on her sooner after he heard her throw up.

The jury convicted defendant of second degree murder (§ 187, subd. (a)), aggravated assault on a child under the age of eight years resulting in death (§ 273ab), and the sale of marijuana (Health & Saf. Code, § 11360, subd. (a)). The trial court sentenced him to a combined indeterminate and determinate prison term of 29 years to life.

DISCUSSION

I

Defendant contends the trial court erred in failing to instruct the jury sua sponte that it needed to determine whether Mia H. was an accomplice and that, if it determined she was, then it must view her testimony with caution and require that her testimony be supported by other evidence connecting defendant to the crime. (§ 1111; CALCRIM

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[2] While out on bail, Mia H. was arrested for driving under the influence of alcohol resulting in bodily injury after she ran into another car. She was sentenced to six years for that offense, for a combined prison term of 12 years.

No. 334.) In defendant's view, there was substantial evidence that Mia H. was an accomplice to the crimes or even the sole perpetrator of the crimes.

Defendant points out that Mia H. had already pleaded guilty to causing and permitting a child in her care and custody (i.e., Valeeya) to suffer unjustifiable pain and suffering (§ 273a, subd. (a)), and she invoked her Fifth Amendment rights prior to testifying because her attorney thought that new evidence had surfaced that could expose her to further liability. At the request of the prosecutor, the trial court granted her immunity. The pathologist testified that Valeeya had extensive injuries and her primary caregiver must have noticed something was wrong, yet Mia H., who had a history with CPS, denied observing any abuse or injuries.

" 'If there is evidence from which the jury could find that a witness is an accomplice to the crime charged, the court must instruct the jury on accomplice testimony. [Citation.] But if the evidence is insufficient as a matter of law to support a finding that a witness is an accomplice, the trial court may make that determination and, in that situation, need not instruct the jury on accomplice testimony. [Citation.]' [Citations.]" (*People v. Lewis* (2001) 26 Cal.4th 334, 369 (*Lewis*).)

Under section 1111, an accomplice is "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." To be chargeable with an identical offense, a witness must be considered a principal under section 31 and not merely an accessory. (*People v. Horton* (1995) 11 Cal.4th 1068, 1113-1114.) Principals are defined as "[a]ll persons concerned in the commission of a crime, . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission . . . ." (§ 31.)

In contrast, an accessory is one "who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said

principal has committed such felony or has been charged with such felony or convicted thereof . . . ." (§ 32.) In other words, an accessory intends to aid a principal avoid the consequences of a completed felony (*People v. Plengsangtip* (2007) 148 Cal.App.4th 825, 836), while an accomplice "must have ' "guilty knowledge and intent with regard to the commission of the crime." ' [Citation.]" (*Lewis, supra,* 26 Cal.4th at p. 369.)

Here, there is no evidence that Mia H. actually abused Valeeya. The child did not act afraid around her, and no one saw or heard Mia H. hurt her. Although there is evidence that witnesses saw defendant hurt Valeeya, there is no evidence that Mia H. intended for him to do so and aided and abetted him in any way. The evidence demonstrates nothing more than Mia H.'s potential culpability as an accessory; that is, she must have seen the injuries defendant inflicted on Valeeya, yet she hid his presence from CPS and protected him rather than her child. Defendant's theory of her culpability as a principal is not substantial; it is speculative. Substantial evidence is "evidence sufficient to 'deserve consideration by the jury,' not 'whenever *any* evidence is presented, no matter how weak.' " (*People v. Williams* (1992) 4 Cal.4th 354, 361.)

But even if the trial court had erred by failing to give accomplice instructions, the error would be harmless because there is sufficient corroborating evidence in the record. (*Lewis, supra,* 26 Cal.4th at p. 370.) Corroborating evidence may be slight, entirely circumstantial, and need not establish every element of the charged offense. (*Ibid.*) The evidence "is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth." (*People v. Fauber* (1992) 2 Cal.4th 792, 834.) Williams, Torres, Stanford and DeShawn all indicated that it was defendant who inflicted the numerous blunt force injuries discovered by the pathologist.

To the extent defendant argues the jury should have been instructed to view Mia H.'s testimony with distrust, other instructions amply covered this concept. The trial court instructed the jury that in evaluating the testimony of a witness it should consider whether the witness's testimony was influenced by bias, a personal relationship with

someone in the case, a personal interest in how the case was decided, whether the witness had been convicted of a felony, whether the witness had engaged in conduct reflecting on his or her believability, and whether the witness was promised immunity or leniency in exchange for his or her testimony. The trial court also instructed the jury on how to assess the believability of a witness who was willfully false in part of his or her testimony. Those instructions were sufficient to inform the jury to view Mia H.'s testimony with care and caution. (*Lewis, supra*, 26 Cal.4th 371.)

Furthermore, defense counsel argued to the jury that Mia H. was simply trying to protect herself, and even the prosecutor disparaged Mia H. and her failure to protect Valeeya, arguing her testimony was only useful to establish a timeline of events. There is no reasonable probability that defendant would have received a more favorable result if the trial court instructed the jury to view Mia H.'s testimony with distrust. (*Lewis, supra*, 26 Cal.4th at p. 371; *People v. Williams* (2010) 49 Cal.4th 405, 456 ["[e]rror in failing to instruct the jury on consideration of accomplice testimony at the guilt phase of a trial constitutes state-law error, and a reviewing court must evaluate whether it is reasonably probable that such error affected the verdict"].)

II

Defendant next contends the trial court deprived him of his federal and state constitutional rights to due process and the presence of counsel when it allowed testimony to be read back to the jury when neither he nor his attorney was present.

After the jury retired to deliberate, both counsel expressly consented to have the court reporter, upon the jury's request, read back the testimony of any witness without the presence of the parties or the trial court. During deliberations, the jury requested a readback of the testimony of Dr. Mark Super and Jahmal Stanford. Because the request was made late in the day, the trial court excused the jurors for the day and directed that counsel be notified of the request when the proceedings reconvened the following morning. Although the record does not expressly reflect whether the court's directives

were followed, we presume they were followed before the jury resumed deliberating and returned its verdict the following afternoon.

The United States Supreme Court has never held that allowing a readback of witness testimony outside the presence of a defendant and his attorney is a violation of the federal Constitution. (See *People v. McCoy* (2005) 133 Cal.App.4th 974, 982.) California Supreme Court decisions that have considered the issue have uniformly held there is no federal or state constitutional violation when a readback occurs outside the presence of a defendant or his attorney because the rereading of testimony is not a critical stage of the proceedings. (*People v. Butler* (2009) 46 Cal.4th 847, 865; *People v. Cox* (2003) 30 Cal.4th 916, 963, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Ayala* (2000) 23 Cal.4th 225, 288; *People v. Horton, supra*, 11 Cal.4th at pp. 1120-1121; see also *People v. Pride* (1992) 3 Cal.4th 195, 251 [no violation of a defendant's rights to counsel and due process even though "no one was present (the court, counsel, or defendant) to monitor or report the readback"].)

Defendant acknowledges that we are required to follow decisions of the California Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) He simply wishes to preserve the issue for review in federal court. We conclude there was no constitutional violation.

III

Defendant further maintains the judgment must be reversed because of the cumulative prejudicial effect of the aforementioned errors. But the contention fails because defendant has not shown there were multiple errors at trial. (*People v. Avila* (2006) 38 Cal.4th 491, 608; *People v. Vieira* (2005) 35 Cal.4th 264, 305.)

IV

Defendant contends his sentence of 25 years to life for assault on a child with force likely to produce great bodily injury resulting in death was cruel and unusual punishment under the United States and California Constitutions. He believes his

sentence of 15 years to life for second degree murder, which the trial court stayed pursuant to section 654, would be the more appropriate punishment.

In *People v. Norman* (2003) 109 Cal.App.4th 221 (*Norman*), this court held that a claim of disproportionate punishment under the state or federal Constitutions is fact specific and must be raised in the trial court or it is forfeited. (*Id.* at p. 229.) Defendant failed to raise this claim in the trial court so it is forfeited. As in *Norman*, however, we will reach the merits "in the interest of judicial economy to prevent the inevitable ineffectiveness-of-counsel claim." (*Id*. at p. 230.)

Norman involved facts similar to the instant case. In *Norman*, the defendant killed his six-year-old son, was convicted of second degree murder and violating section 273ab, and was sentenced to 25 years to life. (*Norman*, *supra*, 109 Cal.App.4th at p. 224.) This court said the sentence did not violate the Eighth Amendment, noting that the United States Supreme Court has upheld life sentences for nonviolent drug offenses. (*Norman*, at p. 230, citing *Harmelin v. Michigan* (1991) 501 U.S. 957 [115 L.Ed.2d 836]; *Rummel v. Estelle* (1980) 445 U.S. 263 [63 L.Ed.2d 382].) Applying the three-part test of *In re Lynch* (1972) 8 Cal.3d 410, 425-427 (*Lynch*), this court also concluded the punishment was not cruel or unusual under the California Constitution. (*Norman, supra*, 109 Cal.App.4th at pp. 230-232.)

Defendant presents no reason to reach a different result here. If the Eighth Amendment permits a sentence of life without possibility parole for a nonviolent drug offense (see *Harmelin v. Michigan*, *supra*, 501 U.S. at pp. 961, 994-995 [115 L.Ed.2d at pp. 843, 864-865]), then "a sentence of 25 years to life is not cruel and unusual for the death of a child under age eight." (*Norman, supra*, 109 Cal.App.4th at p. 230.)

In *Lynch*, the California Supreme Court held "a punishment may violate article I, [section 17 of the California Constitution] if, although not cruel or unusual in its method, it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*Lynch*, *supra*, 8 Cal.3d at p. 424.)

When reviewing a penalty for disproportionality, we consider three areas: (1) the nature of the offense and the offender; (2) a comparison of the sentence with punishments for more serious offenses in the same jurisdiction; and (3) a comparison of the sentence with punishments for the same offense in other jurisdictions. (*Id.* at pp. 425-427.)

Regarding the first area, the nature of the offense and the offender, " 'we must consider not only the offense as defined by the Legislature but also "the facts of the crime in question" (including its motive, its manner of commission, the extent of the defendant's involvement, and the consequences of his acts); we must also consider the defendant's individual culpability in light of his age, prior criminality, personal characteristics, and state of mind.' [Citation.]" (*People v. Uecker* (2009) 172 Cal.App.4th 583, 600.)

Defendant, who has no criminal record, is unlike the violent recidivist defendant in *Norman* (*Norman, supra,* 109 Cal.App.4th at p. 230), but *Norman* did not turn on the defendant's criminal record. "A life sentence for a vicious murder of a small child cannot be said to be disproportionate whether it was premeditated or not. Despite defendant's repeated requests to view section 273ab in the abstract, he ignores the fact that this terrible child homicide was a second degree murder. He cannot argue he did not possess malice because the jury found he did so." (*Norman, supra,* 109 Cal.App.4th at p. 230.)

Here defendant was convicted of the second degree murder of three-year-old Valeeya. The girl's behavior around defendant demonstrated she was very afraid of him and with good reason. The nature and extent of her injuries showed that defendant was depraved, callous and indifferent to the suffering he repeatedly inflicted on her. Applying *Norman,* we conclude defendant failed to satisfy the first prong of *Lynch.*

Defendant disagrees, attempting to paint himself as a man-child overwhelmed by the adult responsibilities of raising another person's offspring, noting that Valeeya should have been removed from the home by CPS due to the mother's poor parenting skills. His appellate attorney states that "other responsible individuals played significant roles in

making it possible for this immature young man, twenty years old at the time of Valeeya's death, to be in a position for which he was ill-suited, providing primary care for young children." Relying on *People v. Dillon* (1983) 34 Cal.3d 441 (*Dillon*), disapproved on another ground in *People v. Chun* (2009) 45 Cal.4th 1172, 1186, he intimates defendant should not be so severely punished for Valeeya's death because CPS and Mia H. were also to blame, yet Mia H. received a much lighter sentence. This case, however, is not similar to *Dillon*.

In *Dillon*, the California Supreme Court considered an attempted raid of a marijuana field by a group of teenagers. (34 Cal.3d at pp. 451-452.) Dillon, a 17-year-old high school student, had gone with some companions to steal the marijuana when he shot a man who was guarding the crop. (*Ibid.*) Dillon testified that he panicked and shot the victim because the man was armed, because Dillon believed the guard had just shot two of his friends, and because he believed the man was about to shoot him. (*Dillon*, at pp. 482-483.) Expert testimony established that Dillon was unusually immature, intellectually and emotionally. (*Id.* at pp. 483, 488.) Dillon's companions all received minor sentences in the incident, Dillon had no prior record, the jury had expressed some reluctance at finding Dillon guilty of first degree felony murder, and both the judge and the jury believed a life sentence was excessive in relation to Dillon's true culpability. (*Id.* at pp. 487-488.)

In the present case, there was no expert evidence that defendant was unusually immature. His crime was not "a response to a suddenly developing situation that defendant perceived as putting his life in immediate danger." (*Dillon, supra,* 34 Cal.3d at p. 488.) Instead, he chose to repeatedly and severely "whoop [Valeeya's] ass" over minor infractions that were typical of a three-year-old child. There was no evidence that Mia H. engaged in similar behavior. Defendant's reliance on *Dillon* is misplaced.

Defendant does not address the second and third prongs of *Lynch*. But this court stated in *Norman* that a defendant convicted of violating both section 273ab and second

degree murder "cannot seriously argue that his lifetime maximum sentence for section 273ab is disproportionate to other California crimes, because he also has a lifetime maximum sentence for second degree murder." (*Norman, supra,* 109 Cal.App.4th at p. 231, fn. omitted.) Regarding the third prong of *Lynch*, this court determined in *Norman* that "there is nothing to indicate to us that the California statute is grossly out of step with similar statutes in the rest of the country, particularly when a defendant has also been convicted of murder." (*Norman, supra,* 109 Cal.App.4th at p. 232, fn. omitted.) We take defendant's failure to refute our holding in *Norman* as a concession that his sentence withstands constitutional challenge with respect to the second and third prongs of *Lynch.* (*People v. Retanan* (2007) 154 Cal.App.4th 1219, 1231.)

Defendant gives us no reason to reject this court's holding in *Norman.* We conclude his sentence is neither cruel nor unusual.

V

Our review of the record discloses that, in connection with the conviction for aggravated assault on a child under the age of eight years resulting in death, the abstract of judgment incorrectly indicates that defendant was convicted of violating section 273a, subdivision (b), which is a misdemeanor. But defendant was charged with and convicted of violating section 273ab, which states in pertinent part: "(a) Any person, having the care or custody of a child who is under eight years of age, who assaults the child by means of force that to a reasonable person would be likely to produce great bodily injury, resulting in the child's death, shall be punished by imprisonment in the state prison for 25 years to life. . . ." Because the law appears clear, we will direct the trial court to correct the abstract of judgment without further briefing in the interests of judicial economy. Any party aggrieved may petition for rehearing.

DISPOSITION

The judgment is affirmed. The trial court is directed to correct the abstract of judgment to reflect that defendant was convicted of violating section 273ab, not section

273a, subdivision (b), and to send a certified copy of the corrected abstract of judgment to the Director of the Department of Corrections and Rehabilitation.

MAURO, J.

We concur:

RAYE, P. J.

BLEASE, J.